Citation: Abdi v. TD General Insurance Company, 2022 ONLAT 19-008845/AABS-R

RECONSIDERATION DECISION

Before:	**Deborah Neilson**
Licence Appeal Tribunal File Number:	**19-008845/AABS**
Case Name:	**Hilded Abdi v. TD General Insurance Company**

Written Submissions by:

For the Applicant:	Corey Sax, Counsel
	Jillian Carrington, Counsel

OVERVIEW

[1] This request for reconsideration was filed by the applicant in this matter. It arises out of a decision in which I found that the applicant failed to prove that he sustained a catastrophic impairment under the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale as a result of his minor traumatic brain injury sustained in a motor vehicle accident on June 29, 2017.

[2] The issue that was before me was whether the applicant sustain a catastrophic impairment as defined under criterion 4(ii) of s.3.1(1) of the *Schedule*; a traumatic brain injury that when assessed in accordance with the Glasgow Outcome Scale (the "GOS") and the Extended Glasgow Outcome Scale (the "GOS-E") results in a rating of Upper or Lower Severe Disability six months or more post-accident or a Lower Moderate Disability one year or more post-accident.

[3] The applicant submits that the Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made. He is seeking an order cancelling my decision.

[4] I have been assigned the responsibility to decide this matter in accordance with Rule 18.1 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* [the "*LAT Rules*"] as amended.

RESULT

[5] The applicant's request for reconsideration is dismissed.

BACKGROUND

[6] The applicant sustained non-displaced pelvic fractures, a right ear laceration and a mild traumatic brain injury ("TBI") in the accident. The parties could not agree on whether the applicant sustained a catastrophic impairment under s.3.1(1)4(ii) of the *Schedule* as result of his TBI. Under s.3.1(1)4(i) of the *Schedule*, there must be diagnostic evidence of brain trauma, which the applicant had. However, he was also required to prove on a balance of probabilities the following:

a. He had an Upper Severe Disability or Lower Severe Disability six months or more after the accident or a Lower Moderate Disability one year or more after the accident under the GOS and the GOS-E when assessed in accordance with Wilson, J., Pettigrew, L. and Teasdale, G., *Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow*

Outcome Scale: Guidelines for Their Use, *Journal of Neurotrauma*, Volume 15, Number 8, 1998 (the "*GOSE Guides* ").[1]

[7] I rejected the applicant's submission that my role was to determine which expert's opinion carried more weight and accept that expert's opinion on whether the applicant had the requisite GOS-E to be catastrophically impaired as defined in the *Schedule.* I determined that, as the trier of fact, I must look at each part of the GOS-E checklist and determine whether the applicant could participate in the activity absent a non-brain physical or psychological injury. If the applicant was unable to participate in activities because of his minor TBI, then I must include that in the GOS-E scale.

[8] I also rejected the applicant's submission that the timing of my determination of whether the applicant meets the GOS-E was constrained to the time of his initial GOS-E assessment. I adopted a more flexible approach and determined that an adjudicator is not restricted to looking at only the time of the first assessment. An adjudicator may look at an insured's condition beyond the date of the first assessment. However, the timing of the evidence of an insured's condition could affect the weight to be given to that evidence.

[9] Another issue between the parties was the extent the GOS-E assesses non-TBI related disabilities. I determined that under the GOS-E catastrophic determination, the disability must be a result of the TBI and not as a result of other psychological or physical injuries.

[10] I gave little weight to the applicant's experts' opinions and evidence for reasons set out in my decision. As a result, I found that the applicant failed to prove on a balance of probabilities that he sustained a Severe Disability (either Upper or Lower) six months or more after the accident or a Lower Moderate Disability one year or more after the accident as a result of his TBI.

ANALYSIS

[11] The grounds for a request for reconsideration to be allowed are contained in *LAT Rule* 18. A request for reconsideration will not be granted unless one or more of the following criteria are met:

[1] Section 3.1(1)4(ii) A of the *Schedule* states that an insured person who sustains a Vegetative State (VS or VS*) under the GOS-E one month or more after the accident is catastrophically impaired. I did not need to consider it as there was no evidence that the applicant in this case was ever in a vegetative state.

a) The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

c) The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

d) There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[12] The ground that the applicant argues applies to this case is as follows:

a. The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made.

[13] More specifically, the applicant submits that the Tribunal made the following errors of fact or law:

a. I erred in law in the temporal analysis of the GOS-E and interpretation of the *Schedule*;

b. I erred in law by discrediting Dr. David Kurzman's opinion by finding the GOS-E must be done by a physician, not an occupational therapist; and

c. I erred in fact and law by failing to give appropriate weight to the respondent's occupational therapist's observations.

Timing of the GOS-E

[14] The applicant submits that I overlooked the intention of the drafters of the *GOSE Guides* that only pre-injury and current status at the time of the assessment should be considered by the assessors. The *GOSE Guides* define "current" as within the past week. The applicant also submits that my interpretation of the *GOSE Guides* and the *Schedule* is an error of law because it allows insurers to intentionally delay their catastrophic insurer's examination ("IE") assessments, thereby allowing insured persons to recover before they are assessed, with the result that the insurers would obtain more favorable assessment.

[15] The applicant submits that I erred by not strictly following the *GOSE Guides* and its requirement that an assessment be current. The applicant submitted that by

incorporating the *GOSE Guides* into the *Schedule*, the *GOSE Guides* should be given more weight when there is a conflict with the wording of the *Schedule.*

[16] The GOS-E is designed for assessing outcome after a head injury. The *Schedule* is a regulated contract. It is clear from my analysis of the *GOSE Guides*, the *Schedule* and the case law on how to apply medical guides incorporated into the *Schedule* at paragraphs 21 to 29 of my decision that I considered the applicant's submissions and the intention of the drafters of the *GOSE Guides* on current timing. I provided an interpretation of the *GOSE Guides* and the *Schedule* that allows them to be read together harmoniously.

[17] The applicant has provided no reasons or case law to demonstrate that a flexible approach by an adjudicator to the timing of the GOS-E is an error of law. The applicant's submissions do not address how, if an adjudicator is restricted to only looking at an insured's status at the time of a first assessment, an insurer's right to an IE would be redundant. The applicant has not provided any case law to show that a harmonious interpretation of the *GOSE Guides* and the *Schedule* that does not lead to a redundancy is an error of law.

[18] It is clear that I considered the applicant's concerns about insurers intentionally delaying a GOS-E catastrophic IE by my comments at paragraph 29 of my decision. I determined that such delays could be addressed by the weight to be given to the IE reports. My interpretation also addresses the converse of the applicant's submission about delayed assessments: the applicant's interpretation could also lead to insured persons withholding catastrophic impairment applications and the results of GOS-E assessments. Such delays would mean that insurers would not have an opportunity to do their own assessments.

[19] The applicant's reconsideration submissions are a reiteration of the arguments he made at the hearing. I am unable to find a flexible approach to the timing of the evidence instead of a snapshot in time is an error of law.

Administration of the GOS-E Interview

[20] The applicant submits that I erred in law and discredited Dr. Kurzman's catastrophic finding by indicating that, in accordance with the *Schedule*, a catastrophic assessment must be done by a physician. Dr. Kurzman is the neuropsychologist who testified on behalf of the applicant. He testified that the structured GOS-E interview, which is a set list of questions to be answered, was prepared by an occupational therapist, Nikita D'Souza. I determined that Ms. D'Souza's GOS-E assessment was not done in accordance with the *Schedule* or the *GOSE Guides.*

[21] I determined that the GOS-E assessment is required to be done by a physician or a neuropsychologist. The applicant submits that I erred in law because ss.45.(2) 1 and 2 of the *Schedule* allow for a physician to be assisted by other "regulated health professionals." The applicant submits my decision is an error of law because it means that occupational therapists are unable to perform in-home assessments or situational assessments, which routinely accompany multi-disciplinary catastrophic insurer examinations. The applicant applies the same reasoning to testing by psychometrists. He submits this would serve to invalidate hundreds, if not thousands, of assessments which rely on this kind of assistance.

[22] I have a difficult time understanding the applicant's submissions. Section 45(2)1 and 2 of the *Schedule* state that an assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician or a neuropsychologist in the case of TBI, and that they may be assisted by such other regulated health professionals as he or she may require. I recognized the role regulated health professionals may play in a catastrophic impairment assessment under s.45(2) as evidenced by my comment at paragraph 18 of my decision. I stated that an assessment by an occupational therapist to determine a person's disabilities and handicaps is a very useful tool for the physician or neuropsychologist doing a GOS-E assessment.

[23] The applicant's submission that I erred is based on common practice as to what occupational therapists do. He provided no evidence that hundreds and thousands of occupational therapists have conducted GOS-E interviews instead of the directing physician or neuropsychologist. I gave a reasoned analysis at paragraphs 15 and 18 of my decision. I do not agree that reasoned analysis in the face of what may or may not be common practice amounts to an error of law.

[24] The applicant has provided no case law or authority to support that a common practice carries more weight than a reasoned analysis. Accordingly, I am unable to find any error in my determination that a physician or a neuropsychologist may rely on a regulated health professional to assist in determining the GOS-E, but that the GOS-E assessment or interview should be conducted by the physician or neuropsychologist.

[25] The applicant submits that I further invalidated Dr. Kurzman's report based on his reliance on Ms. D'Souza's abbreviated version of the GOS-E questionnaire. He submits that I failed to explain how Ms. D'Souza abbreviated the interview. As set out in paragraph 19 of my decision, it was Ms. D'Souza who testified that she did not administer the complete questionnaire.

[26] It is not an error of law to not recite every piece of evidence. However, for clarity's sake, Ms. D'Souza was asked what tests she administered to address the applicant's ability to attend school. Her answer was that she only gave the applicant a six-month GOSE assessment, even though she assessed the applicant sixteen months post-accident. She did not give him the twelve-month assessment because she would have had to comment on all of the sections of the GOS-E form for a twelve-month assessment. The applicant had an opportunity to explore this on redirect of Ms. D'Souza and did not do so. If Ms. D'Souza had done the complete assessment, she would have addressed the applicant's ability to attend school. This would have required an assessment of his pre-accident university career and his poor pre-accident university marks. However, according to her own testimony, she did not do so.

[27] Even if I erred in law, it would not have changed my decision. My reasons for giving Dr. Kurzman's report little weight were not based solely on who prepared the GOS-E interview. I provided several other reasons for the weight I gave to his report and opinion in paragraphs 20, 41, 42, 47, 48, 49, 50, 51, 59, and 60 of my decision.

Weight of an Occupational Therapist's Report

[28] The applicant submits that I erred in fact and law by failing to analyze Dr. West's complete dismissal of the insurer's occupational therapist, Laura Youm. I agree that I did not specifically comment on Ms. Youm's observations. Nor did I address Dr. West's treatment of Ms. Youm's report. However, an adjudicator is not required to address every submission or refer to all of the evidence when providing reasons for why a report should be given less or more weight.

[29] The applicant submits that it was incumbent upon me to address his submission that Dr. West was dismissive of Ms. Youm's observations because there was evidence that he was dismissive of the medical evidence. The applicant cites an example that Dr. West did not find the applicant sustained a loss of consciousness despite treating doctors having observed evidence of same. However, as set out in my decision at paragraph 66, there was no medical evidence that the applicant lost consciousness. At the most, the evidence was that he <u>may</u> have lost consciousness.

[30] There is no dispute that the applicant's reports to both his occupational therapist, Ms. D'Souza, and to Ms. Youm are consistent. In fact, I remarked at paragraph 45 that the applicant's testimony of his complaints was fairly consistent with what he reported to various assessors including Dr. West. My dismissal of the applicant's claim did not hinge on what the applicant told either occupational

therapist. Nor did it hinge on what they observed were the applicant's functional limitations. The core of my decision dealt with the applicant's failure to prove that he has an Upper Severe Disability or a Lower Severe Disability six months or more after the accident or a Lower Moderate Disability one year or more after the accident that was caused by his TBI as opposed to some other impairment caused by the accident.

[31] The similarity between the observations made by Ms. D'Souza and Ms. Youm make no difference to my finding. This is because neither occupational therapist is qualified to provide an opinion on whether the functional impairments they observed in the applicant were caused by his TBI or non-TBI related psychological or musculoskeletal injuries. If I gave less weight to Dr. West's report, it would not change the problems apparent with Dr. Kurzman's report and testimony for the reasons set out in my decision. It is because of those problems that I was unable to find the applicant proved on a balance of probabilities that he sustained a catastrophic impairment.

CONCLUSION

[32] A reconsideration under *LAT Rule* 18 is not an opportunity to relitigate a matter. It is open to the Tribunal, as the trier of fact, to weigh evidence and to make reasonable findings based on that evidence. I conducted a close and careful review of the expert evidence in this case and supported my factual and legal findings with reasoned analysis. The applicant has identified no error of fact or law that would warrant reconsideration in this matter.

[33] For these reasons, I deny the applicant's request for reconsideration.

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Deborah Neilson
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: February 16, 2022